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No. 87 - 6700

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN HENRY SELVAGE,

Petitioner,

- v -

JAMES A. LYNAUGH,
Director, Texas Department
of Corrections,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In its brief in opposition to Mr. Selvage's petition for writ of certiorari, the state premises its opposition upon a distorted characterization of the claims Mr. Selvage presents under Lockett v. Ohio. The state says that "Selvage argues that the Texas capital sentencing statute precludes jury consideration of relevant mitigating evidence that might serve as a basis for a sentence less than death." With the claims so characterized, the state then argues that the statute did not prevent consideration of the mitigating evidence available to Mr. Selvage because the mitigating evidence which was produced or which could have been produced on his behalf was logically relevant to the two special issues, the evidence was or could have been considered in the jury's course of responding to the special issues, and the jury's affirmative responses to the special issues was apparently no more than a decision to give greater weight to the competing evidence presented by the state than to the mitigating evidence presented by Mr. Selvage.

Though persuasive in relation to the state's characterization of Mr. Selvage's claims, this argument bears no weight in relation to the actual claims presented by Mr. Selvage. Mr. Selvage's claims do not center upon preclusion of the jury's consideration of mitigating evidence. Rather, they center upon the statute's failure to provide a constitutionally appropriate procedural vehicle for the jury to express its view that the mitigating evidence, once considered, does not warrant a death sentence. The statute allows "consideration" of any mitigating evidence logically relevant to the special questions, as in Mr. Selvage's case. However, if the mitigating evidence fails to negate the deliberateness of the murder or to assure the sentencer that the defendant poses no threat of dangerousness in the future, it cannot lead the jury to impose a life sentence, even though the sentencer might find that it should.

Notwithstanding the state's argument here, mitigating evidence can be sufficiently weighty to call for a life sentence even though it does not rebut the evidence showing that the homicide was committed deliberately or that the defendant may be dangerous in the future.

As it did in Mr. Selvage's case, the evidence may show beyond a reasonable doubt that the homicide was committed deliberately, yet may also show that it was the product of impaired judgment, exercised by one suffering from drug addiction and psychosis, who miscalculated the threat posed to others when he undertook an armed robbery, and who during the course of the robbery misperceived the threat posed to him by others and began shooting. Such a homicide may have been committed "deliberately and with the reasonable expectation that the death of the deceased or another would result," but shouldn't the jury also have the opportunity to say that, despite this, death should not be the sentence? Isn't this the very meaning of the Eighth Amendment's command that the sentencer be allowed to give independent mitigating weight to the evidence proffered in

mitigation? It is, but the Texas death penalty statute, as applied in Mr. Selvage's case, dishonored this command.

Similarly, the evidence may show beyond a reasonable doubt, as it did in Mr. Selvage's case, that the defendant is likely to be dangerous in the future because of his violent crimes in the past and, indeed, because he suffers from a form of mental illness which itself creates a greater vulnerability to engaging in violent behavior. Nevertheless, shouldn't the jury be able to decide that the very reason that the defendant may continue to pose a risk of danger in the future is a reason not to impose a sentence of death? Doesn't the Eighth Amendment require that the sentencer be allowed to decide that "defendants who commit criminal acts that are attributable . . . to emotional and mental problems [are] less culpable than defendants who have no such excuse," California v. Brown, ___ U.S.___, 93 L.Ed.3d 934, 942 (1987), and impose a life sentence because of this? Of course it does, but the Texas statute does not give the sentencer this option.

It is this -- the singular failure of the Texas statute to give the jury the option to impose life when it reasonably believes the evidence calls for life, even though the evidence simultaneously calls for an affirmative answer to the statutory special issues -- about which Mr. Selvage complains. It is not, as the state would frame it, the statute's "preclusion of the consideration of mitigating evidence."

While Mr. Selvage's trial counsel recognized this feature of the Texas statute -- so clearly that they refrained from investigating or presenting Mr. Selvage's mental illness as a mitigating circumstance -- they did not at the time they represented Mr. Selvage recognize that the Constitution could not tolerate it. They did not recognize that this feature of the statute was "a flaw" which was constitutionally assailable. The state's suggestion to the contrary is without any factual support. The reasonableness of their view, tested in the context

of the judicial decisions available to them at the time, is manifest.

Accordingly, for the reasons set forth in the petition, the Court should grant Mr. Selvage's petition or hold it pending the decision in Franklin v. Lynaugh.

May 24, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RICHARD H. BURR III, hereby certify that the Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit herein has been served upon respondent by mailing a copy, by first class mail, to his counsel, Robert S. Walt, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711, this 24th day of May, 1988.

Richard H. Burr III
Of Counsel